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In the Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL ELECTION COMMISSION, APPELLANT

v.

AMERICANS FOR CHANGE, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether a provision of the Presidential Election Campaign Fund Act which limits the amount of money that certain political committees may spend to further the election of publicly financed presidential candidates is consistent with the First Amendment to the Constitution of the United States, where Congress has determined that such a limit promotes compelling governmental interests and is necessary to preserve public funding as an alternative means of financing presidential election campaigns.*

* Other parties to this proceeding are Americans for an Effective Presidency and Fund for a Conservative Majority.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A, *infra*) is not yet officially reported.

JURISDICTION

A three-judge district court was convened pursuant to 26 U.S.C. § 9011(b) to "implement or construe" 26 U.S.C. § 9012(f). On August 28, 1980, the three-judge court entered two expedited orders granting, *inter alia*, appellees' motions for summary judgment. App. B, *infra*. On September 30, 1980, the court issued an opinion holding 26 U.S.C. § 9012(f) unconstitutional and entered a further order disposing of the case consistent with its earlier orders. App. A, *infra*. A timely notice of appeal was filed on October 8, 1980, App. D, *infra*. On November 19, 1980, this Court granted the Federal Election Commission's motion for an extension of time within which to file this Jurisdictional Statement. App. E, *infra*. Jurisdiction is conferred by 26 U.S.C. § 9011 (b) and 28 U.S.C. §§ 1252 and 2101(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble. . . .

26 U.S.C. § 9012(f) provides in relevant part:[1]

> . . . [I]t shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000.

STATEMENT OF THE CASE

A. The Statutory Framework

During the 92nd Congress, two landmark bills dealing with the regulation of campaign finance were enacted: the Federal Election Campaign Act of 1971 ("FECA"), and the Presidential Election Campaign Fund Act of 1971 ("the Fund Act"). Together, the two statutes represent a comprehensive congressional effort to minimize the corrosive effects of aggregated wealth on the integrity of the political process.

The Fund Act established the Presidential Election Campaign Fund, financed by the voluntary tax-

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[1] The Federal Election Commission has lodged with the Court 10 copies of *Federal Election Laws* which sets forth the Presidential Election Campaign Fund Act and the Federal Election Campaign Act of 1971, as amended. The complete text of 26 U.S.C. § 9012(f) appears therein at 71-74.

payer check-off system, to serve as an alternative means of financing presidential general election campaigns. Major party candidates who satisfy the eligibility requirements outlined in 26 U.S.C. § 9003 are entitled to equal payments from the fund to defray all of their "qualified campaign expenses", *i.e.*, expenses incurred by a presidential candidate and running mate, or any of their authorized committees,[2] to further their election. 26 U.S.C. § 9002(11). Once a candidate has chosen a publicly financed campaign, he or she may accept private contributions only as they are necessary to make up for any deficiency in the fund. 26 U.S.C. §§ 9003(b)(2), 9012(b). In no event, however, may a publicly funded candidate spend more than his or her allotment under 26 U.S.C. § 9006. 26 U.S.C. § 9012(a). The provision in question, 26 U.S.C. § 9012(f), serves as a necessary safeguard to the public financing scheme. Section 9012(f) limits expenditures in excess of $1,000 by political committees other than those authorized by the candidate where such expenditures are made to further a publicly funded candidate's election and would, if incurred by the candidate's authorized committees, constitute qualified campaign expenses.

Despite these necessary restrictions, both FECA and the Fund Act contain numerous provisions carefully designed to encourage grass-roots political activity,[3] to allow individuals and groups to spend substantial sums in connection with presidential elections,[4] and to enable political parties to play a strong

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[2] The term "authorized committee" is defined to mean any political committee which is authorized in writing by the candidates to further their election. 26 U.S.C. § 9002(1).

[3] *See, e.g.*, 2 U.S.C. § 431(8)(B)(i) and (xii).

[4] *See, e.g.*, 2 U.S.C. § 431(8)(B)(ii) and (iv); 26 U.S.C. §§ 9002(9) and 9012(f); 2 U.S.C. § 431(9)(B) and (17).

role in furthering the election of their nominees.[5] Considered as a whole, the public financing system represents "a Congressional effort not to abridge, restrict or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process. . . ." *Buckley* v. *Valeo*, 519 F. 2d 817 and 821 (D.C. Cir. 1975) *aff'd. in part, rev'd. in part* 424 U.S. 1, 92-93 (1976).

B. The Parties

Appellee Americans for Change ("AFC") is an unincorporated association and a political committee within the definition of 2 U.S.C. § 431(4) and 26 U.S.C. § 9002(9). AFC registered with the Federal Election Commission ("Commission") as a political committee by filing its Statement of Organization on June 3, 1980, and has since qualified as a multi-candidate political committee under FECA.[6]

Appellee Fund for a Conservative Majority ("FCM") is a multi-candidate political committee, registered with the Commission. FCM originally registered in 1972 with the General Accounting Office as "Young Americans Campaign Committee." On October 13, 1976, FCM filed an amendment changing its name to Fund for a Conservative Majority. "Citizens for Reagan in 1980" is a "project" of FCM which is not separately registered with the Commission.

Appellee Americans for an Effective Presidency ("AEP") is an unincorporated association which is

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[5] *See, e.g.*, 2 U.S.C. § 441a(d)(2); 2 U.S.C. § 431(8)(B)(i).

[6] The term "multi-candidate political committee" is defined to mean "a political committee which has been registered under [2 U.S.C.] section 433 for a period of not less than 6 months, which has received contributions from more than 50 persons, and, . . . has made contributions to 5 or more candidates for federal office." 2 U.S.C. § 441a(a)(4).

a political committee as defined by 2 U.S.C. § 431(4) and 26 U.S.C. § 9002(9). AEP registered with the Commission as a political committee by filing its Statement of Organization on July 8, 1980.[7]

Appellant Federal Election Commission is the independent agency of the United States government vested with the authority to litigate questions involving the construction, implementation and validity of the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013, as well as the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-455, and the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042. The Commission is also vested with primary and exclusive jurisdiction with respect to civil enforcement of these laws. *See* 2 U.S.C. §§ 437c(b)(1), 437d(a)(6), 437d(e); 26 U.S.C. §§ 9005(a), 9007(a) and (b), 9010(c), 9011(b), 9036(a) and (b), 9040(b), (c) and (d). Common Cause, a membership organization, was not a party to the district court's ruling regarding the validity of 26 U.S.C. § 9012(f). App. A at 28a; *see* discussion, *infra* at note 8.

C. The Proceedings Below

On July 15, 1980, the Commission initiated the instant action pursuant to 26 U.S.C. §§ 9010(c) and 9011(b) seeking a declaratory judgment that appellees' expenditures violate 26 U.S.C. § 9012(f) and that the provision is constitutional. A three-judge district court was convened and an expedited schedule set. On July 17, 1980, Common Cause filed a mo-

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[7] Although AEP's reports to the Commission, filed pursuant to 2 U.S.C. § 434, indicate that AEP has contributed to 14 federal candidates and has received contributions from more than fifty persons, it has not yet satisfied the six month registration requirement to qualify as a multi-candidate political committee under FECA.

tion to intervene as a party plaintiff and to consolidate the Commission's action with *Common Cause* v. *Schmitt*, No. 80-1609 (D.D.C.) (three-judge court). On August 28, 1980, the district court issued two expedited orders granting, *inter alia*, summary judgment for the defendants in the action brought by the Commission, denying the motion of Common Cause to intervene in the Commission's suit, and dismissing the Common Cause suit.[8] By order dated

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[8] Common Cause, David Cohen and Winifred Long brought suit seeking a declaration that AFC, AEP, FCM and certain officers thereof were in violation of various provisions of the Fund Act and requesting injunctive relief. Count I of their amended complaint alleged that the activities of the defendants violated 26 U.S.C. § 9012(f). See *Common Cause* v. *Schmitt*, No. 80-847, Appendix to Jurisdictional Statement at 77a-81a. Count II of their amended complaint alleged that defendants' activities resulted in violations of 26 U.S.C. §§ 9002(11), 9003(b)(1)-(2), 9012(a)(1) and 9012(b)(1) in that defendants' expenditures would be "conducted in tandem with and parallel to the official Reagan campaign." *See* Common Cause Appendix at 81a-82a. Jurisdiction was alleged on the basis of 26 U.S.C. § 9011(b) and 28 U.S.C. § 1331. The Commission was allowed to intervene in the Common Cause action and moved to dismiss Common Cause's complaint for lack of subject matter jurisdiction. App. A at 32a.

The court dismissed Count II of Common Cause's action for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. App. A at 29a. In so ruling, the court agreed with the Commission that Count II represented an impermissible attempt by a private plaintiff to enforce the Fund Act in direct contravention of the Commission's exclusive enforcement jurisdiction. App. A at 31a-32a. Common Cause has expressly declined to appeal the dismissal of Count II. *See* Jurisdictional Statement, *Common Cause* v. *Schmitt*, No. 80-847 at 10 n.15.

In addition, the court dismissed Count I of the Common Cause complaint as mooted pursuant to its decision in the Commission's action. The court expressed "no opinion as to whether Common Cause possessed the requisite Article III

September 25, 1980, the court consolidated the two cases. App. C, *infra.*

The court set forth its reasoning for its orders of August 28 in an opinion dated September 30, 1980. *See* App. A, *infra.* At the outset, the court found that § 9012(f) proscribes categorically appellees' expenditures. Properly rejecting the "limiting construction" offered by various appellees, the court concluded that § 9012(f) prohibits all expenditures in excess of $1,000 by unauthorized political committees on behalf of candidates who choose a publicly funded campaign. App. A at 7a.

Moreover, the court, proceeding under the assumption that the analysis in *Buckley, supra,* "controls the election law case before this court," and relying in particular upon the distinction drawn therein between expenditures and contributions, concluded that 26 U.S.C. § 9012(f) does not serve a sufficiently compelling governmental interest to outweigh what the court perceived to be a burden imposed on speech. App. A at 9a, 21a. Based on this limited analysis, which accorded no consideration to the implicit objectives of the public financing scheme nor to the alternative avenues available for individual participation in the electoral process, the district court held 26 U.S.C. § 9012(f) facially unconstitutional under the first amendment.

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characteristics to press Count I of its lawsuit." App. A at 28a. In its Jurisdictional Statement, Common Cause has requested that this Court remand its case for factual development. The Commission presumes that the district court would resolve the jurisdictional ambiguities in the course of any such remand of the Common Cause suit.

ARGUMENT

I. THE DISTRICT COURT HELD UNCONSTITUTIONAL AN INTEGRAL PROVISION OF THE PRESIDENTAL ELECTION CAMPAIGN FUND ACT

This case involves the validity of a provision of the Presidential Election Campaign Fund Act and, consequently, poses substantial questions concerning the authority of Congress to enact legislation protecting the integrity of the electoral process. The Fund Act is a complex, delicately balanced statutory scheme, carefully designed to promote first amendment values. In enacting 26 U.S.C. § 9012(f), the provision in question, Congress determined that unlimited spending by unauthorized committees to defray what would otherwise be qualified campaign expenses on behalf of publicly funded candidates would upset this integrated scheme, pose a danger of real or apparent corruption and undermine the goals of public financing.

The judgment appealed from represents the first occasion wherein a provision of the Fund Act has been found constitutionally infirm. In so ruling, the court below failed to consider § 9012(f) in its appropriate context as an essential component of the public financing scheme and accorded no deference to congressional judgment. In light of the important interests served by the invalidated provision and the novel constitutional issues involved, this case warrants plenary consideration by this Court to reverse the decision below.

A. The Provision at Issue is a Necessary Part of the Public Financing Scheme

The Fund Act is the product of more than a decade of Congressional research and legislative hearings

aimed at bringing meaningful reform to the area of financing presidential election campaigns.[9] In providing for the public financing of presidential general elections, Congress sought to build public confidence in the electoral process; to strengthen the responsiveness of elected officials to voters; to eliminate the pressure, influence and corruption of private campaign funds; to assure fairness and equality of opportunity to all candidates; to revitalize our political system by establishing an alternate means of campaign financing; to insure against repetition of Watergate-type scandals; to eliminate the influence of large contributors; to eliminate the impression that a candidate can "buy" an election; and to provide candidates an alternative to the rigors of fundraising and private financing, freeing them to spend

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[9] Although public funding first became available in the 1976 elections, the need for reform measures to minimize the deleterious effects of aggregated wealth spent on behalf of presidential candidates had been the source of extensive congressional debate since 1948. 117 Cong. Rec. 41,747 (1971). Public financing for presidential general election campaigns was enacted in the Presidential Election Campaign Fund Act of 1966. In 1967, however, Congress concluded that the 1966 Act should be suspended pending the adoption of guidelines governing the distribution of money from the fund. Pub. L. No. 90-26, 81 Stat. 41 (1967); *see* 117 Cong. Rec. 41,746 (1971). A refined version of the Presidential Election Campaign Fund Act was introduced and later enacted as part of the Revenue Act of 1971. Pub. L. No. 92-178, 85 Stat. 573 (1971). Final Congressional resolution of the form of the statutory scheme came in 1974, when automatic appropriations to the fund and the amount of the entitlement were established, and when the Commission was given the responsibility for administration of the fund. Pub. L. No. 93-443, §§ 403-405, 88 Stat. 1263 (1974). In 1976, Congress amended the Fund Act to its present form. Pub. L. No. 94-283, §§ 301-304, 90 Stat. 475 (1976).

more time addressing the issues.[10] Congress clearly intended "to make a major change that would be a tremendous improvement toward lifting the office of the presidency above the power of private money to control it." 117 Cong. Rec. 41,947 (1971) (remarks of Sen. Long). Senator Pastore, the Fund Act's sponsor, aptly expressed Congress's goal of eliminating the political *quid pro quos* that may arise out of financing presidential campaigns through private funds:

> Let's be done with it. Let the President be a free and independent man. Let him not be beholden to anyone.

119 Cong. Rec. 38,900 (1973).

To achieve these objectives, Congress enacted a scheme providing for full public financing of the general election campaigns of major party presidential nominees. Congress repeatedly emphasized, however, that public financing was intended to serve as an "alternative" to, as opposed to a supplement

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[10] *See* S. Rep. No. 93-1239, 93d Cong., 2d Sess. 3-4 (1974); Hearings on S.382 Before the Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration, 92d Cong., 1st Sess. 78 (1971); Hearings on S.1103, S.1954 and S.2417 Before the Senate Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration, 93d Cong., 1st Sess. 70, 207 (1973); 120 Cong. Rec. 10,546 (1974) (remarks of Sen. Hart); 119 Cong. Rec. 38,900 (1973) (remarks of Sen. Pastore); 117 Cong. Rec. 41,777-81 (remarks of Sens. Kennedy, Cranston, Eagleton, and Hart). *See also Buckley* v. *Valeo*, 424 U.S. at 91; *Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. 280, 285 (S.D.N.Y. 1980), *aff'd* 616 F.2d 1 (2d Cir. 1980) (en banc) (per curiam), *aff'd mem.* 445 U.S. 955 (1980).

to, private financing.[11] In order to protect public financing from becoming a mere subsidy, Congress enacted a comprehensive plan to govern presidential election campaign finance, carefully examining each such provision in the context of the overall statutory scheme.

At the heart of this plan lie the eligibility requirements and expenditure limitations. In order to become an "eligible candidate" the candidate must certify that he or she: has not and will not accept any private contributions; will adhere to an expenditure limitation; will maintain and furnish to the Commission, when requested, materials pertaining to the candidate's qualified campaign expenses; will submit to an audit and examination by the Commission after the election; and will make whatever repayments are required by the Commission. 26 U.S.C. §§ 9002(4) and 9003. The candidate must also be the presidential nominee of a major party, as defined in 26 U.S.C. § 9002(6).[12] If these conditions are satisfied, and if the candidate so chooses, the candidate will receive $20,000,000 plus an adjustment for inflation, to defray all general election campaign expenses. 26 U.S.C. § 9004(a)(1).[13]

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[11] *See, e.g.*, S. Rep. No. 92-553, 92d Cong., 1st Sess. 56 (1971), 117 Cong. Rec. 41,762 (1971) (remarks of Sen. Pastore).

[12] A candidate of a minor or new party, as defined by 26 U.S.C. § 9002(7) and (8), may establish eligibility to receive public funding in an amount which bears the same ratio to the amount paid to a major party as the number of votes cast for that minor/new party in the last election (or, if the party did not participate in that election, the present election) bears to the average number of popular votes received by the major party candidates for President in the preceding presidential election. 26 U.S.C. § 9004(a)(2) and (3).

[13] The amount for 1980 was $29,440,000. *See* 2 U.S.C. § 441a(b)(1)(B) and (C).

Candidates who opt to receive public funds may not incur qualified campaign expenses in excess of the amount of public monies received under the Fund Act. 26 U.S.C. §§ 9003(b)(1), 9004(a)(1), 9007 (b) and 9012(a); 2 U.S.C. § 441a(b)(1)(B). Publicly financed candidates are also prohibited from accepting any form of private financing to augment the public monies received and spent on behalf of their campaigns other than to compensate for deficiencies in the fund. 26 U.S.C. §§ 9003(b)(2), 9007(b)(3), and 9012(b)(1). Individuals and political committees are similarly prohibited from making money or in-kind contributions. 26 U.S.C. § 9012(b). The foregoing restrictions were upheld by this Court in *Republican National Committee* v. *Federal Election Commission*, *supra*, in which the Court affirmed the three-judge district court's conclusion that, "the public interest purposes behind the decision of Congress to provide for the financing of presidential elections would hardly be served unless some reasonable limits and conditions were imposed." 487 F. Supp. at 285, *aff'd mem.* 445 U.S. 955 (1980).

Similarly, in enacting 26 U.S.C. § 9012(f), the provision in question, Congress determined that the public financing scheme required a limitation on the amount which unauthorized political committees could spend to further the election of publicly funded candidates. In proposing his amendment to permit committee expenditures up to $1,000 per candidate, Senator Taft stated that the purpose of § 9012(f) "is to prevent any political committees from being formed as a subterfuge so that they can go beyond the authorization of the committees and make expenditures that were not within the limitations of the expenditures which are in the bill." 117 Cong. Rec. 42,397 (1971). And as Senator Hart observed: "This

provision ensures, of course, that the public fund will not just be [a] base for ever-increasing campaign spending." 117 Cong. Rec. 41,780 (1971). *See also* 117 Cong. Rec. 42,397 (1971) (remarks of Sen. Hart) (". . . this language is necessary purely to accomplish the purpose of this bill."); 117 Cong. Rec. 41,780 (1971) (remarks of Sen. Cranston) ("The amendment could painfully, at long last, liberate American political parties from financial dependence on big money, big pressure groups and big spenders of all kinds . . .").

Section 9012(f) was thus rooted in Congress's wise, indeed expert, assessment of the potential danger in allowing political professionals to amass, control and spend vast sums to secure the election of presidential candidates. As this Court has acknowledged, the risk that presidential candidates may become, or even appear to be, beholden to these private benefactors is the precise evil which the Fund Act sought to eradicate. *Buckley* v. *Valeo*, 424 U.S. at 91, 96; *Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. at 284, *aff'd mem.* 445 U.S. 955 (1980). Moreover, Congress recognized that § 9012 (f) must apply to those committees functioning "independently" from the candidate's official campaign.[14] The danger that vast "independent" expenditures will create "implicit obligations", or the appearance of such obligations, to those who control these expenditures is particularly great in the context of a publicly funded campaign, where the candidate must adhere to an expenditure limitation and may not accept private contributions to supplement public funds received. Presidential election campaigns are, moreover, highly visible; no prior consultation or coordi-

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[14] *See* H.R. Rep. No. 94-917, 94th Cong., 2d Sess. 5 (1976).

nation with the candidate's campaign is required to apprise anyone as to how best to assist the candidate. Indeed, as this Court observed in *Buckley* v. *Valeo*, *supra*, to conclude otherwise would "naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence. . . ." 424 U.S. at 45.[15]

Having concluded that some limit on expenditures by unauthorized committees was necessary to preserve the integrity of the public financing system, Congress determined that a limitation of $1,000 would best serve this purpose. Well aware of the high cost of federal campaigns, Congress acknowledged that "when you incur an expense to promote the candidacy of a presidential candidate, $1,000 is small." 117 Cong. Rec. 42,399 (1971) (remarks of Sen. Pastore). Nevertheless, Congress concluded that the $1,000 limit was essential to vitiate the influence of aggregated wealth in presidential campaigns and to prevent circumvention of the expenditure limitations. The choice of that figure is clearly a permissible legislative judgment. As this Court concluded nearly fifty years ago:

> The power of Congress to protect the election of President and Vice-President from corruption being clear, the choice of the means to that end presents a question primarily addressed to the judgment of Congress.

Burroughs & Cannon v. *United States*, 290 U.S. 534, 547 (1934); *Louisville Gas Co.* v. *Coleman*, 277 U.S. 32, 41 (1928) (Holmes, J., dissenting). *See also*

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[15] *See also United States* v. *United Automobile Workers*, 352 U.S. 562, 570-84 (1957).

Marchioro v. *Chaney*, 442 U.S. 191 (1979); *Buckley* v. *Valeo*, 424 U.S. at 13 n.16.[16]

The lessons of the last two presidential election cycles indicate that Congress' judgment reflected farsighted wisdom. Spending by unauthorized political committees on behalf of presidential candidates has increased dramatically during the past four years.[17] Absent § 9012(f), such spending will continue to rise, bringing with it the very cloud of suspicion over the Presidency that the Fund Act was designed to dispel. Indeed, this Court has held that the Fund Act, insofar as it eliminates even the appearance of corruption, promotes a compelling governmental interest. *Buckley* v. *Valeo*, 424 U.S. at 91, 95; *Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. at 285, *aff'd mem.* 445 U.S. 955 (1980); *see* discussion, *infra* at 26-29.

B. 26 U.S.C. § 9012(f) is Consistent with First Amendment Freedoms of Speech and Association

The Fund Act and FECA are specifically structured to permit individuals, both directly and through political party associations, to contribute and spend substantial amounts on behalf of the candidates they support.[18] *Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. at 286, *aff'd*

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[16] A conclusion that the $1,000 ceiling is too low, imposing an undue burden on first amendment rights, does not require that the concept of § 9012(f) be held facially unconstitutional. While this Court concluded that the $10 and $100 threshold reporting requirements in FECA were "indeed low," the Court sustained the provisions since the line drawn was "necessarily a judgmental decision, best left in the context of this complex legislation to the congressional discretion." *Buckley* v. *Valeo*, 424 U.S. at 83.

[17] See discussion, *infra* at note 37.

[18] *See* 2 U.S.C. § 441a.

mem. 445 U.S. 955 (1980). Indeed, the public financing scheme was carefully designed by Congress "to meet all major constitutional, practical, and political objections," 117 Cong. Rec. 41,777 (1971) (remarks of Sen. Kennedy), and to "further . . . first amendment values." *Buckley* v. *Valeo*, 424 U.S. at 93. Section § 9012(f) is a narrowly drawn provision of this integrated scheme, limited by its terms to expenditures made by unauthorized political committees to defray the qualified campaign expenses of publicly financed presidential candidates. Congress determined that by enacting § 9012(f) it would not "straightjacket organizations that have a legal right . . . to express their personal opinion." 117 Cong. Rec. 42,399 (1971) (remarks of Sen. Pastore).

This Court, in holding the limits on campaign contributions constitutional, has recognized the attenuated relationship between contributions to political committees and the contributors' interests in speech and association. In so holding, this Court stressed the availability of a wide range of ways for individuals to express their support for federal candidates. *Buckley* v. *Valeo*, 424 U.S. at 20-22; *see also Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. at 286, *aff'd mem.* 445 U.S. 955 (1980) (prohibitions on contributions "imposed by [the Fund Act] do not abridge the rights of supporters"). Moreover, in evaluating allegations of first amendment infringement when set against legitimate public interests, the Court has looked to the availability of alternative means of communication. *See, e.g., Linmark Associates* v. *Township of Willingboro*, 431 U.S. 85, 93 (1977); *Pell* v. *Procunier*, 417 U.S. 817 (1974); *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548 (1973).

Similarly, § 9012(f) does not impinge directly on political expression and association by individuals,

and implicates the first amendment only in a very limited fashion.[19] While individuals cannot contribute directly to a publicly financed candidate, the Fund Act and FECA provide other significant avenues of political expression. *Buckley* v. *Valeo*, 424 U.S. at 28. Every individual, through the voluntary check-off provision, has an equal opportunity to contribute to the fund to be used by presidential candidates. In addition, individuals are permitted to make unlimited expenditures on behalf of any presidential candidate. *See* 2 U.S.C. § 431(9) and (17). *Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. at 286, *aff'd mem.* 445 U.S. 955 (1980). Individuals are free to volunteer their services on behalf of any presidential candidates or political committee and to associate with and work for the candidate's political party. 2 U.S.C. § 431(8)(B)(i). *See Buckley* v. *Valeo*, 424 U.S. at 22, 28, 48 n.54, *citing Civil Service Commission* v. *Letter Carriers*, 413 U.S. at 579; *Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. at 286, *aff'd. mem.* 445 U.S. 955 (1980). Individuals may use

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[19] Indeed, section 9012(f) further exempts from its provisions expenditures by a broadcaster regulated by the Federal Communications Commission, or by a periodical publication, in reporting the news or in taking editorial positions (26 U.S.C. § 9012(f)(2)(A) and expenditures made by nonprofit (26 U.S.C. § 501(c)) organizations in communicating to their respective members the views of those organizations. (26 U.S.C. § 9012(f)(2)(B)). Thus, 26 U.S.C. § 9012(f), by merely permitting non-party political committee expenditures up to $1,000 in support of a candidate who has chosen public funding, only minimally infringes on the first amendment, and intrudes upon rights of association only in an indirect manner. *Cf. California Medical Association* v. *Federal Election Commission, supra*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9127 at 50,992 (9th Cir. May 23, 1980), *possible jurisdiction postponed*, No. 79-1952 (Oct. 6, 1980).

their real or personal property and provide invitations, food and beverages up to $1,000 in an election, 2 U.S.C. § 431(8)(B)(ii), and may spend an additional $1,000 on personal travel on behalf of a candidate. 2 U.S.C. § 431(8)(B)(iv).[20]

Individuals may also contribute up to $20,000 a year to a national political party which in turn may make expenditures, in connection with the general election campaign, of up to two cents for each member of the voting age public—an amount of $4,637,653.76 in 1980—on behalf of the party's presidential candidates. 2 U.S.C. § 441a(d)(2), formerly 18 U.S.C. § 608(f); *see Buckley* v. *Valeo*, 424 U.S. at 49 n.67. Moreover, individuals may freely associate with and contribute to state and local party committees which in turn may defray the costs of such grass-roots activities as voter registration and get-out-the-vote drives on behalf of the party's presidential and vice presidential candidates. 2 U.S.C. § 431(8)(B)(xii). Individuals may also contribute to a multi-candidate political committee which may in turn spend up to $1,000 to defray qualified campaign

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[20] Section 9012(f) does not limit an individual's ability to give or spend money to promote issues and to help issue-oriented groups. *See United States* v. *National Committee for Impeachment*, 469 F.2d 1135, 1139-42 (2d Cir. 1972); and *American Civil Liberties Union* v. *Jennings*, 366 F. Supp. 1041, 1055-57 (D.D.C. 1973), *vacated as moot sub nom. Staats* v. *ACLU*, 422 U.S. 1030 (1975). *See also Buckley* v. *Valeo*, 424 U.S. at 79 n.106. Indeed, section 9012(f) effectively makes the same distinction between expenditures made to support publicly financed presidential candidates and other political activity as do the Hatch Act restrictions upheld in *United Public Workers* v. *Mitchell*, 330 U.S. 75, 99-100 (1947) and *Civil Service Commission* v. *Letter Carriers*, 413 U.S. at 556.

expenses of each publicly financed candidate.[21] 2 § 441a(a)(1), 26 U.S.C. § 9012(f).

Further, the statutory definition of political committee does not necessitate a determination that individuals who wish to make independent expenditures as an informal group may not make such expenditures.[22] Indeed, the Commission, authorized to "administer, seek compliance with, and formulate policy with respect to" the Fund Act, has never decided that an informal group, in which individuals retain control over their funds, would be considered a political committee. Therefore, individuals are free to associate in an informal group and may well make independent expenditures to amplify their voices in support of a publicly financed candidate without qualifying as a political committee.

Appellee multi-candidate political committees are not groups of individuals, as envisioned by the lower court, who merely desire a "professional touch" to amplify their "small voices." App. A. at 19a, 22a.[23] Individuals contributing to these political committees

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[21] The drafters of the Fund Act understood that "by allowing unauthorized committees to spend up to $1,000 for their [Presidential] candidates, the [Fund Act] avoids the First Amendment objections that might be raised against any complete prohibition of private spending." 117 Cong. Rec. 41,777 (1971) (remarks of Sen. Kennedy).

[22] 26 U.S.C. § 9002(9) defines "political committee" as "any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office."

[23] In upholding the $5,000 contribution limitation, the ninth circuit viewed multi-candidate political committees as "natural targets for candidate influence." *California Medical Association* v. *Federal Election Commission, supra* at 50,991.

have no voice in any decision regarding contributions made to federal candidates. Indeed, an individual could not ensure that funds donated for use in connection with the presidential campaign would be used for that purpose. Since the political committees could not accept earmarked contributions for use in presidential campaigns,[24] and since the appellees are multicandidate committees which, by definition, contribute to more than one federal candidate, it is possible that funds given to benefit the presidential campaign effort were expended on behalf of a congressional candidate.[25] Therefore, since the contributions were transformed into speech by someone other than the contributor, any limit on expenditures by the political committee on behalf of presidential candidates only indirectly infringes on the individual's first amendment rights. Moreover, the associational rights guaranteed by the first amendment are adequately protected by the myriad avenues of expression through political committees which FECA and the Fund Act promote.[26] *Buckley* v. *Valeo*, 424 U.S. at 21. The district court's holding to the contrary is clear error.

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[24] *See Buckley* v. *Valeo*, 424 U.S. at 34 n.40.

[25] *See* note 35, *infra*.

[26] However, while it is "well established that association . . . [is a] form of political expression protected under the First Amendment, . . . these activities are not protected absolutely and may be subject to governmental regulation where there is an overriding state interest in such regulation." *Bread Political Action Committee* v. *Federal Election Commission*, No. 80-1146, slip op. at 9 (7th Cir. Dec. 5, 1980) (en banc) (citations omitted). *See* discussion, *infra* at 26.

II. THE DECISION OF THE DISTRICT COURT CONFLICTS WITH *BUCKLEY* v. *VALEO* AND *REPUBLICAN NATIONAL COMMITTEE* v. *FEDERAL ELECTION COMMISSION*

The decision below cannot be reconciled with controlling authority in this Court or the decisions of other Circuits. This Court has upheld the validity of expenditure limitations in the context of public financing on three occasions and delineated a clear distinction between a person spending money directly for speech and giving money to a political committee to be spent for speech.[27] By finding that the limitation of § 9012(f) violates the first amendment rights of contributors to appellee political committees, the court below reached a decision incompatible with this Court's rulings in *Buckley* v. *Valeo*, *supra* and *Republican National Committee* v. *Federal Election Commission*, *supra*.

A. The District Court Misapplied *Buckley* v. *Valeo*

In *Buckley*, this Court reviewed challenges to the constitutionality of various provisions of the Federal Election Campaign Act and of the Presidential Election Campaign Fund Act. As to the challenges to the Fund Act, this Court found no merit in claims that the challenged provisions of the Fund Act violate either the First or the Fifth Amendment. *Buckley* v. *Valeo*, 424 U.S. at 86.[28] In its review of the expendi-

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[27] This Court upheld the constitutionality of the Fund Act in *Republican National Committee* v. *Federal Election Commission*, *supra*. *See also California Medical Association* v. *Federal Election Commission*, *supra*; *Mott* v. *Federal Election Commission*, 494 F.Supp. 131, 137 (D.D.C. 1980), *appeal docketed*, No. 80-1949 (D.C. Cir. Aug. 12, 1980), No. 80-2069 (D.C. Cir. Sept. 4, 1980) (distinction drawn between direct and indirect expression).

[28] 26 U.S.C. § 9012(f) itself was not challenged in *Buckley* v. *Valeo*, *supra*, and the Court rejected as unripe challenges

ture limitations, the Court found that FECA's "expenditure ceilings impose direct and substantial restraints on the quantity of political speech." 424 U.S. at 39. Thus the Court found that 18 U.S.C. § 608 (e)(1) (limitation on spending by individuals and groups "relative to a clearly identified candidate"), § 608(a) (limitation on spending by candidates), and § 608(c) (limitation on spending by campaigns), did not serve the "substantial governmental interest in stemming the reality or appearance of corruption in the electoral process." 424 U.S. at 48.[29] However, the Court upheld all challenged expenditure limitations in the context of publicly financed campaigns.

Preliminarily, the Court found that "public financing of Presidential elections as a means to reform the electoral process" was a legitimate choice made by Congress pursuant to its power to legislate for the "general welfare". United States Constitution, art. I, § 8, cl. 2; *Buckley* v. *Valeo*, 424 U.S. at 90. Therefore, the Court upheld Congress's choice of prior election vote totals to determine eligibility for pre-election funding to major party candidates and to limit new party candidates to post-election funds. 424 U.S. at 97. The Court noted:

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to other subsections of 26 U.S.C. § 9012. *See*, Answers to Certified Questions, 424 U.S. at 143 n.178, *aff'g* 519 F. 2d at 898-900.

[29] The Court narrowly construed § 608(e)(1) to apply only to "expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office" in order "to preserve the provision against invalidation on vagueness grounds." *Buckley* v. *Valeo*, 424 U.S. at 44. As narrowly construed, the Court then found that the provision was inadequate to serve "the governmental interest in preventing corruption" because it "prevents only some large expenditures." 424 U.S. at 45.

> Without any doubt a range of formulations would sufficiently protect the public fisc and not foster factionalism, and would also recognize the public interest in the fluidity of our political affairs. We cannot say that Congress' choice falls without the permissible range.

424 U.S. at 104.[30]

Moreover, the Court specifically held that its "holdings invalidating 18 U.S.C. § 608(a), (c), and (e)(1)" did not require "the conclusion that [public financing of presidential campaigns] is unconstitutional." Recognizing that "the expenditure limitations accepted by a candidate to be eligible for public funding are identical to the limits in § 608(c)," the Court had "no difficulty in concluding" that the public financing provisions were severable. *Buckley* v. *Valeo*, 424 U.S. at 108. The analysis of *Buckley* supports the constitutionality of 26 U.S.C. § 9012(f). The Court's holding that a generally applicable expenditure limit does not meet the demands of the First Amendment does not require a conclusion that the expenditure limitation of § 9012(f) is in the same manner unconstitutional. Just as *Buckley* let stand other expenditure limitations in the context of public financing, the *Buckley* analysis would uphold § 9012(f). The district court's holding to the contrary conflicts with this Court's holding in *Buckley* v. *Valeo*, *supra*, and must be reversed.

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[30] The Court similarly upheld the 10-state requirement for eligibility for presidential public funding, *Buckley* v. *Valeo*, 424 U.S. at 104 n. 140; public funding of party conventions, 424 U.S. at 104, and primary election campaign financing, 424 U.S. at 105. *See also Gelman* v. *Federal Election Commission*, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9130 at 51,021 n. 13 (D.C. Cir. July 18, 1980), *cert. denied* —— U.S. ——, 49 U.S.L.W. 3227 (Oct. 6, 1980).

Moreover, the district court (using the words "contribution" and "expenditure" as talismans for constitutional sufficiency) found that the "case before this court is an 'expenditure' case because it is precisely the speech of individual *contributors* which is hampered by the statutory restriction" and concluded that § 9012(f) "fails to survive the strict scrutiny required by the First Amendment." App.A at 17a, 27a (emphasis added). The court's holding disregarded § 9012(f)'s important function within Congress's public financing design (*see* discussion, *supra* at 8) and misapplied the *Buckley* rationale to the Court's mistaken view of the facts of this case. Thus, the court found that appellee political committees are "simply 'pooling agents' for many small voices [31] wishing to make intelligible political statements" and that "[t]he money expended by the committees pays for political communications which speak the language of their members and contributors." App. A at 17a. The district panel did not and could not identify any factual example of the agent-principle relationships it claimed existed between appellee political committees and their contributors.

Indeed, even a cursory review of the record indicates that there exists between AEP, AFC, and FCM and its contributors the type of political committee-contributor relationship envisioned by this court in *Buckley*, 424 U.S. at 21-22. AFC, AEP and FCM are political committees within the definitions at 2 U.S.C. § 431(4) and 26 U.S.C. § 9002(9). AFC and

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[31] During the last quarter of the 1980 election year cycle, FEC records indicate that the "small voices" to which the court referred made an average itemized contribution of at least $1,120 to AEP, $700 to FCM and $750 to AFC. By comparison, the average itemized contribution to the Anderson for President general election campaign fund was $180.

FCM have each qualified as multi-candidate political committees.[32] Appellee committees indicate that they are ongoing entities and will operate not simply as groups of individuals making "independent" expenditures on behalf of a single candidate during the 1980 election cycle. FCM, for example, has been in existence since 1972. Moreover, contrary to the view of the district court, contributors to appellee committees do not exercise any control over the committees' policy or management other than in a highly indirect manner by refusing to contribute.[33] Such a role for the contributor is consistent with the conclusion of this Court in *Buckley* that contributions are symbolic expressions which might be transformed into speech by someone other than the contributor. *Buckley* v. *Valeo*, 424 U.S. at 21-22.

Moreover, contrary to the view of the district court, contributors to appellee political committees can receive no assurance that their contributions will even be used for expenditures on behalf of a presidential candidate. As noted, *supra*, appellee political committees are or will soon become multi-candidate political committees which make contributions to House and Senate candidates. *See* 2 U.S.C. § 441a(a)(4).

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[32] *See* discussion, *supra* at 4.

[33] The lower court found that "[t]he communication sponsored by the political committees [presumably AFC, AEP, FCM] is the language of their members and contributors because the contributions are made based on an understanding and community of political interest among all of the contributors and their political committees." App. A at 18a. The court went on, however, to point out that "[t]he contributors do have power over the speech disseminated by the political committees. . . . If a committee disappoints its membership, contributions will dry up." *Id.* Commission records disclose that over 90% of the contributions to AFC and AEP are from one-time contributors.

Indeed, Commission records reveal that all of the political committees in question have made contributions to such federal candidates. Clearly, the district court erred when it found that "money expended by the committees pays for political communications which speak the language of their members and contributors." App. A at 17a.[34]

The court below, misperceiving the true nature and make-up of appellee political committees, has misconstrued this Court's analysis in *Buckley* regarding contributions and expenditures. The judgment of the court below is in clear error and accordingly must be reversed.

B. The District Court Misapplied *Republican National Committee* v. *Federal Election Commission* When It Concluded that 26 U.S.C. § 9012(f) Does Not Further a Compelling Governmental Interest in Eliminating Corruption

This Court in *Buckley*, *supra*, found that "[i]t cannot be gainsaid that public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest." *Buckley* v. *Valeo*, 424 U.S. at 96. Moreover, this Court affirmed the finding of the United States Court of Appeals for the Second Circuit (en banc) and the three-judge court convened pursuant to 26 U.S.C. § 9011(b) that public financing of presidential

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[34] For example, AFC indicated in its 30 day post general election report that it made over $17,000 in contributions to 17 federal candidates, that it had a cash-on-hand balance of $54,301.21 and outstanding debts totaling $50,982. Similarly, during the period 7/1/80-11/24/80 AEP made $14,000 in contributions to 14 federal candidates, had a cash-on-hand balance of $47,502 with no outstanding debts. During the same period, FCM made approximately $66,000 in contributions to 60 federal candidates, had a cash-on-hand balance of $48,781 and outstanding debts of $183,394.

campaigns does not violate the first amendment rights of either the candidates or their supporters. *Republican National Committee* v. *Federal Election Commission, supra.*

The district court nevertheless held that the $1,000 expenditure limitation contained in section 9012(f) fails to serve the compelling interest in eliminating corruption. The lower court's analysis in this regard overlooked both the true source of possible corruption in a publicly financed campaign and the role which expenditures have come to play in presidential elections, misapplying *Republican National Committee* v. *Federal Election Commission, supra.*

The real possibility of a *quid pro quo* arises not from the "small voices" of contributors but from those limited number of political committee decision-makers who determine where and when each committee's resources will be allocated.[35] The district

[35] Indeed, John Bailey of Bailey, Deardourf and Associates, AEP's advertising/media consultant, has observed that "the people who wield the authority out of private fundraisers are . . . the people who raise the money. . . . [T]he guy who can raise $50,000 in contributions is the guy who is incredibly important to that campaign and therefore has significant power." *See Republican National Committee* v. *Federal Election Commission, supra,* Joint Appendix at 1525a-26a. Recent statements of Terry Dolan, Chairman of the National Conservative Political Action Committee, whose committee made over $1.5 million in unauthorized expenditures on behalf of Ronald Reagan, illustrate the potential use of power by such individuals:

> Ronald Reagan is going to be President for 4 years, and it would be awfully nice to have as many conservative leaders in as many positions of responsibility as possible.

ABC World News Tonight, November 5, 1980. It was further reported that Mr. Dolan "was claiming scalps and warning that even President-elect Reagan had better mind his conservative P's and Q's." Mr. Dolan responded that Mr. Reagan had a "political obligation" to follow a conservative

court, by focusing on the possible corrupting influence of "small voices", completely overlooked a more important concern: the deleterious effect of large expenditures made by certain individuals on behalf of publicly financed presidential candidates with a $29.4 million expenditure limit.

This Court in *Buckley* presciently recognized the potentially deleterious effect of large "independent" campaigns, such as those conducted by appellee political committees when it noted that:

> the independent advocacy restricted by the provisions *does not presently appear* to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions.

Buckley v. *Valeo*, 424 U.S. at 46 [36] (emphasis added). And in *Republican National Committee* v. *Federal Election Commission*, *supra*, the court recognized that:

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stance or "if he [didn't] . . . he [would] pay the political price" for his failure. CBS Evening News, November 5, 1980. *See Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. at 284, *aff'd mem.* 445 U.S. 955 (1980).

[36] This Court's opinion was written in January 1976. In the four years since that decision, the assessment of the role of independent expenditures has drastically changed from "independent expenditures [may become] one of the most important elements in a changing political process," (An Analysis of the Impact of the Federal Election Campaign Act, 1972-78, Final Report to the Committee on House Administration by the Campaign Finance Study Group, The Institute of Politics, Harvard University (May 1979) at 5-12), to "the issue of this big money casting a dark cloud over the integrity of the American political system will become a great issue and the American people will demand a stop to it." (News Comments of Vice President Walter E. Mondale—St. Paul, Minnesota—November 5, 1980).

Congress' power to enact the very statutes here under attack was recognized by the Supreme Court in *Buckley* v. *Valeo*, 424 U.S. 1, 57 n.65 (1976), where the Court stated:

> "Congress may engage in public financing of election campaigns and *may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations.* Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forego private fundraising and accept public funding." (Emphasis added.) (citation omitted.)

487 F. Supp. at 284, *aff'd mem.* 445 U.S. 955 (1980); and that, acceptance of public financing being voluntary,

> the supporters may not complain that the government has deprived them of the right to contribute. . . As in *Marchioro* v. *Chaney*, 442 U.S. 191, 99 S.Ct. 2243, 2248, 60 L. Ed. 816 (1979), the complaint of the contributors should be addressed to the candidate who has chosen to forego private financing, rather than to the court.

487 F. Supp. at 286, *aff'd mem.* 445 U.S. 955 (1980).

The district court's rejection of 26 U.S.C. § 9012 (f) as a constitutionally sufficient means for Congress to attain the goal of corruption-free publicly funded presidential campaigns is a rejection of *Republican National Committee* v. *Federal Election Commission, supra.* Section 9012(f) is necessary for the legitimate congressional purpose affirmed by this Court.[37]

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[37] Preliminary Commisison figures indicate that at least $11 million in unauthorized committee expenditures were made on behalf of the Republican presidential candidates in the general election through November 24, 1980. In contrast,

CONCLUSION

Based on the foregoing arguments and authorities, appellant respectfully requests that this Court note jurisdiction in this appeal, receive full briefs on the merits and hear oral argument in order to resolve the substantial questions presented by this case.

Respectfully submitted,

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DECEMBER 29, 1980

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for 1975-76, $1,646,540 in unauthorized committee expenditures were spent for or against Presidential candidates. Should this trend toward increased spending on behalf of presidential candidates continue, the congressional purpose behind the enactment of public financing—to limit big money and its influence—will be destroyed. If the expenditure limits of § 9012(f) are erased, expenditures by political committees will become an additional and significant source of funds for publicly financed candidates, and a vehicle to circumvent the Fund Act's expenditure limitations. *See California Medical Association* v. *Federal Election Commission, supra* at 50,990. Indeed, this Court upheld public financing against the fifth amendment challenge of minor party candidates on the basis that the expenditure limitations and the ban on private contributions included in the public financing scheme would enhance minor party candidates' access to potential sources for private contributions. *Buckley* v. *Valeo*, 424 U.S. at 94-96. Section 9012(f) would appear to serve the same purpose.

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

(Consolidated)

Three-Judge Court

COMMON CAUSE, ET AL., PLAINTIFFS

v.

HARRISON SCHMITT, ET AL., DEFENDANTS

FEDERAL ELECTION COMMISSION, INTERVENOR

CA 80-1754

Three-Judge Court

FEDERAL ELECTION COMMISSION, PLAINTIFF

v.

AMERICANS FOR CHANGE, ET AL., DEFENDANTS

Case heard before *Circuit Judges* TAMM and WILKEY, and *District Judge* PENN, Three-Judge District Court.

Opinion filed for the court by *Circuit Judge* WILKEY.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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AMERICANS FOR CHANGE, ET AL., DEFENDANTS

OPINION

WILKEY, *Circuit Judge*:

The Federal Election Commission ("FEC"), and Common Cause, a public interest organization, sued in two separate actions various groups of Ronald Reagan supporters who plan to spend monies to promote his chances in the 1980 presidential election. Both plaintiffs alleged that the plain language of

section 9012(f) of the Presidential Election Campaign Fund Act ("Fund Act")[1] prohibits the defendants' proposed expenditures which will exceed $1,000 to further the election of Ronald Reagan. As the Republican candidate for President, Mr. Reagan is entitled under the Fund Act to receive, and has already accepted, almost $30 million in public campaign funding. Pursuant to 26 U.S.C. section 9011 (b) this three-judge district court was convened with jurisdiction to "implement or construe" the Fund Act. The statute further directs the court to act as quickly as practicable. On 19 August 1980 we heard oral argument on the scope and constitutionality of section 9012(f). On 28 August 1980 the court issued two expedited Orders granting, *inter alia*, summary judgment for the defendants in the FEC action, and dismissing the Common Cause action. In this Opinion we develop our reasoning for the two Orders of 28 August.

I. STATUTORY PROHIBITION AGAINST EXPENDITURES BY POLITICAL COMMITTEES

A. *Background*

The defendants in both actions are various organizations, as well as a few of their organizers, who are broadly soliciting contributions from individuals who favor Ronald Reagan for president. These organizations plan to use the money they collect—they hope to raise and spend millions of dollars —to hire professional media and political consultants and purchase advertising, *etc.* They intend these expenditures to yield an effective program to promul-

[1] 26 U.S.C. § 9001 *et seq.* (1976).

gate their political views before the November election. The defendant organizations have registered with the FEC as "political committees."[2] The defendants' literature and solicitation materials detail their support for Ronald Reagan and outline their intention to spend the sums collected to realize their collective aspirations for the presidential election.

B. *Statutory Basis Jurisdiction and Substantive Prohibition*

1. *Jurisdiction in a Three-Judge District Court*

The FEC is plainly authorized by section 9011(b)(1) of the Fund Act to seek a declaratory judgment "that section 9012(f) validly prohibits expenditures in excess of $1,000 such as defendants have indicated they intend to undertake."[3] The statute is set out

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[2] A "political committee" is

> any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office.

26 U.S.C. § 9002(9) (1976).

Under another statute, the Federal Election Campaign Act of 1971 ("FECA"), 2 U.S.C. § 433(a) (1976), any "political committee" that is not an authorized campaign committee must file a statement of organization with the FEC within 10 days after becoming a political committee within the meaning of 2 U.S.C. § 431(4). The definition of "political committee" within the FECA is roughly the same as the definition of that term in the Fund Act.

[3] Motion of FEC for Summary Judgment at 30.

in full in the margin.[4] The right of Common Cause to bring such an action, on the other hand, is equivocal. We will reserve all discussion of the Common Cause lawsuit until Parts IV and V below.[5]

The statute requires a three-judge district court to entertain actions to "implement or construe" the Fund Act. This action to test the scope and validity of section 9012(f) is within the jurisdiction of this

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[4] 26 U.S.C. § 9011(b) (1976) provides:

§ 9011. Judicial review

(b) Suits to implement chapter.—

(1) The Commission, the national committee of any political party, and individuals eligible to vote for President are authorized to institute such actions, including actions for declaratory judgment or injunctive relief, as may be appropriate to implement or contrue [*sic*, quoted here as "construe"] any provision of this chapter.

(2) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this subsection and shall exercise the same without regard to whether a person asserting rights under provisions of this subsection shall have exhausted any administrative or other remedies that may be provided at law. Such proceedings shall be heard and determined by a court of three judges in accordance within the provisions of section 2284 of title 28, United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.

[5] Common Cause requested substantial discovery of defendants as well as injunctive relief, neither of which was integral to the FEC complaint. *See* Parts IV-V *infra*.

court to "implement or construe" provisions of the Act.

2. *Prohibition Against Expenditures by "Political Committees"*

The plain language of section 9012(f) proscribes categorically the defendants' planned expenditures. They, the defendant "political committees," plan "to incur expenditures" "in an aggregate amount exceeding $1,000" "to further the election" of presidential candidate Reagan. This program of expenditures is a criminal offense according to the statutory section which is entitled "Criminal penalties." In pertinent part it reads:

> §9012. Criminal penalties
>
> (f) Unauthorized expenditures and contributions.—
>
> (1) Except as provided in paragraph (2), it shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000.
>
> * * * *
>
> (3) Any political committee which violates paragraph (1) shall be fined not more than $5,000, and any officer or member of such committee who knowingly and willfully consents to

> such violation and any other individual who knowingly and willfully violates paragraph (1) shall be fined not more than $5,000, or imprisoned not more than one year, or both.

We understand section 9012(f)(1) to prohibit *all* expenditures over $1,000 by political committees including *"independent expenditures."* An independent expenditure is an expense incurred by a political committee free of any coordination with the official and authorized campaign committees of the candidate. We reject the limiting construction of section 9012 (f) offered by defendants Harrison H. Schmitt, Carl T. Curtis, and Americans For Change. They suggest that the provisions may be interpreted as prohibiting only coordinated expenditures which have been authorized or requested by a publicly funded presidential candidate.[6] Though this "saving" construction would neatly preserve the statutory proscription from constitutional infirmity under *Buckley* v. *Valeo*[7] the language of the section will not support this rescue.

The section's plain terms apply broadly to *all* expenditures and this is in contrast with another section, section 9002(11) of the Fund Act, where Congress did adopt limiting language of this kind. If the limiting construction were correct, that is, if the expenditure prohibition applied only to expenditures authorized or requested by the candidate, then the section's existing proviso that only such expenditures are prohibited as "would constitute qualified cam-

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[6] *See* Memorandum of Points and Authorities in Support of Motion to Dismiss of Defendants Harrison H. Schmitt, Carl T. Curtis and Americans For Change at 10-13.

[7] 424 U.S. 1, 46-47 & n. 53 (1976).

paign expenses if incurred by an authorized committee of [the] candidate[]" would be more or less superfluous. The prohibited coordinated, or non-independent, expenditures would then *all* be qualified campaign expenses [8] rendering the proviso unnecessary.

Also, another election law statute, 2 U.S.C. section 441a(a)(1)(A), already prohibits individuals, groups, and committees from making contributions in excess of $1,000. A "contribution," however, is defined, in 2 U.S.C. section 441a(a)(7)(B)(i), to include "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate. . . ." Hence we can only read the expenditure prohibition in section 9012(f) to mean what it says: *all expenditures* over $1,000 by political committees which further a presidential candidate's election are illegal. We are compelled then to determine the constitutionality of this expenditure limitation consistent with the First Amendment analysis conceived in *Buckley* v. *Valeo*.[9]

II. FIRST AMENDMENT ANALYSIS UNDER *BUCKLEY* v. *VALEO*

In *Buckley* v. *Valeo* [10] the Supreme Court held that the campaign expenditure ceilings imposed by Congress in the Federal Election Campaign Act of 1971 ("FECA")[11] were unconstitutional. The Court reasoned that a statutory restriction on amounts which

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[8] *See* 26 U.S.C. § 9002(11) (1976).

[9] 424 U.S. 1 (1976).

[10] *Id.* at 12-59.

[11] 2 U.S.C. § 431 *et seq.* (1976).

citizens, groups, or candidates could expend in a political campaign was an impermissible limitation of the freedoms of speech and association protected by the First Amendment. The watershed case controls the election law case before this court. Thus a discussion of *Buckley* is appropriate before beginning our own constitutional analysis of the severe expenditure ceiling imposed on political committees.

A. *Campaign Expenditures Are Speech*

The Supreme Court made quite clear in *Buckley* that the power of Congress to regulate federal election was well-established under the Constitution.[12] That power to regulate, however, is not unbounded; it must of course be exercised consistent with rights guaranteed by the Constitution.

Campaign activity is speech on the highest constitutional plane. "The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " [13] Moreover, political expression in a campaign is associational activity also protected by the First Amendment. The Constitution guarantees the " 'freedom to association with others for the common advancement of political beliefs and ideas,' a freedom that encompasses '[t]he right to associate with the political party of one's choice.' " [14]

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[12] *Buckley* v. *Valeo*, 424 U.S. at 13.

[13] *Id.* at 14 (quoting *Roth* v. *United States*, 354 U.S. 476, 484 (1957)).

[14] *Id.* at 15 (quoting *Kusper* v. *Pontikes*, 414 U.S. 51, 56, 57 (1973) (*quoted in Cousins* v. *Wigoda*, 419 U.S. 477, 487 (1975)).

"The First Amendment protects political association as well as political expression." *Buckley* v. *Valeo*, 424 U.S. at

The Supreme Court noticed in *Buckley* the reality that public communication is expensive. Free speech is costly. Television, radio, newspaper, buttons—the Court has acknowledged that "these expensive modes of communication [are] indispensable instruments of effective political speech." [15] A restriction on the amount which can be spent on political communication is a practical limitation on the political issues which can be addressed or answered in a campaign. It also limits the range of participants in the political debate, and the size of the audience.

B. *Level of Judicial Scrutiny*

It was strenuously argued to the Supreme Court in *Buckley* that *expenditures* in a campaign entailed primarily "conduct" and not "speech." The Court rejected this contention emphatically,[16] stating that "this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment." [17] "[T]he governmental interests advanced in

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15. The Court noted that the constitutional right of association was derived from the role of group association to advocate *effectively* public and private points of view. *Id.* (citing *NAACP* v. *Alabama*, 357 U.S. 449, 460 (1958)).

[16] *Id.* at 19.

[17] *Id.* (citations omitted).

Unlike [*United States* v.] *O'Brien*, [391 U.S. 367 (1978) (draft-card burning case)] where the Selective Service System's administrative interest in the preservation of draft cards was wholly unrelated to their use as a means of communication, it is beyond dispute that the interest

support of the Act [*i.e.*, FECA] involve 'suppressing communication.' The interests served by the Act include restricting the voices of people and interests groups who have money to spend and reducing the overall scope of federal election campaigns." [18] Following *Buckley*, then, it is plain that election laws regulating political expression require a demonstration of "compelling governmental interest" to withstand a constitutional challenge calling for "strict scrutiny" by the reviewing court.

C. *Compelling Governmental Interest*

The Supreme Court considered three governmental interests adduced to support the contribution and expenditure ceilings: to prevent corruption, or, the appearance of corruption; to mute the voices of affluent groups and persons; and, to put a "brake" on the ballooning cost of election campaigns.[19] Only the first

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in regulating the alleged "conduct" of giving or spending money [in a campaign] "arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." 391 U.S., at 382.

Id. at 17.

Obviously Congress *intends*, albeit neutrally, to regulate the speech-potential of money contributions and expenditures through the election laws it enacts. The giving and spending of money is alluring to the candidate because of the speech-potential it provides to him or her, while to Congress that particular speech-potential also represents the enticement that could be the wedge of corruption, tainting the candidate and the election process. Thus Congress's regulatory intention with respect to campaign contributions and expenditures necessarily involves the regulation of speech.

[18] *Id.* at 17.

[19] *Id.* at 25-26.

interest, to squelch corruption, was held constitutionally sufficient to support the FECA's $1,000 contribution limitation—a limitation on speech. The Court was crystal-clear in stating that Congress had no valid power to "equaliz[e] the relative ability of individuals and groups to influence the outcome of elections. . ."; because, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." [20]

In short, the Court has indicated the prevention of corruption is the singular compelling governmental interest justifying the limit on maximum contributions to candidates. Congress has constitutional authority, the Court held, to ensure that the marketplace of ideas in an election is not recast as a marketplace of "influence."

D. *Constitutional Distinction Between Contributions and Expenditures*

The Court *did not accept* that even the compelling anticorruption governmental interest supported a limitation on *expenditures* in a campaign. The Court reasoned that limitations on *expenditures* were more restrictive of First Amendment rights than limitations on *contributions*, hence the congressional objective to protect the new contribution ceilings by closing the so-called loop-hole of "independent" expenditures was constitutionally insufficient.[21] Preventing corruption would justify the contribution ceilings but would not also justify expenditure ceilings that redress only tangentially the corruption problem (*i.e.*,

[20] *Id.* at 48-49.

[21] *Id.* at 44.

by "protecting" contribution limits from circumvention), yet severely impinge on free speech rights.[22] Controlling contributions, the Court believed, would exorcise *quid pro quo* from the political scene.[23] Impeding the opportunity for venal politician/contributor relationships was a constitutionally valid means of accomplishing the governmental interest in fighting corruption. Contribution ceilings preserve electoral integrity without directly impinging on the rights of individuals.[24] On the other hand, "the independent advocacy restricted by the [expenditure] provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." [25] For, "[u]nlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." [26]

The right of citizens and groups to make expenditures in a campaign poses, according to the Court, only the most attenuated danger of *quid pro quo*. Evidently, *spending* money can just not be equated with *giving* money as a source of possible corruption. The Court noted that the threat of corruption in political spending was mitigated to a large extent by coupling unlimited expenditures with a strict restriction on contributions (which the Court upheld). There was no evil in collecting small amounts from

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[22] *Id.* at 45.

[23] *Id.*

[24] *Id.* at 58.

[25] *Id.* at 46.

[26] *Id.* at 47.

myriad individual contributors and then translating those funds into political communication spreading the candidate's message.[27] Thus the Court struck down FECA's section 608(e)(1) which limited independent expenditures, saying, "[t]hese provisions place substantial and direct restrictions on the ability of candidates, citizens, *and associations* to engage in protected political expression, restrictions that the First Amendment cannot tolerate."[28]

A final perspective on *Buckley's* requirement of unlimited expenditures[29] comes from the more recent explication of the election laws in the *Republican National Committee* v. *Federal Election Committee* trilogy.[30] These cases upheld public financing of presidential elections. Candidates, the constitutional rationale goes, are permitted to forgo their own right to private contributions and unlimited expenditures in exchange for (exclusive) financing from the

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[27] *See id.* at 56 & n.64 (quoting from Judge Tamm's separate opinion, concurring in part and dissenting in part, *Buckley* v. *Valeo*, 519 F.2d 821, 917 (D.C. Cir. 1975)).

[28] *Id.* at 58-59 (emphasis added).

[29] Pivotal to the Court's analysis of electoral integrity *vis à vis* independent expenditures was the statutory provision that "controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act." *Id.* at 46. The Court recognized that it was one thing for Congress to restrict expenditures free from the candidate's control, but quite another for Congress (validly) to limit sham, "independent" expenditures, which being in the candidate's effective control amounted to nothing more than masked contributions and could be regulated as such.

[30] 100 S.Ct. 1639 (1980), *aff'g summarily*, 487 F. Supp. 280 (S.D.N.Y.) (three-judge court), *and*, 616 F.2d 1 (2d Cir.) (*en banc*).

public coffers. This is a voluntary decision made by the candidate, presumably, because the candidate believes that his or her political communication is enhanced by public funding, even given the restrictions. The candidate's decision, however, cannot bind his or her supporters outside the official campaign. Public funding—and the election law after *Buckley*—leaves open to supporters a wide range of means to express their support and their politics. In fact, *Republican National Committee* public funding (*e.g.*, no private contributions, expenditure ceilings, *etc.*) are permissible only because the rights of supporters are left untouched. "Most important", reflected the court, is that "uncoordinated expenditures are permitted without limit. Limitations on uncoordinated expenditures were held unconstitutional in *Buckley* v. *Valeo*." [81]

III. SECTION 9012(f) LIMITATIONS ON EXPENDITURES BY POLITICAL COMMITTEES INHIBITS FIRST AMENDMENT FREEDOMS

The foregoing discussion of *Buckley* indicates the dubious constitutional quality of election law ceilings limiting amounts which may be independently expended in a campaign. The *Republican National Committee* cases still reserve a highly protected status for *independent expenditures* even since the advent of (conditional) public funding for presidential candidates (who accept the terms). Now we turn to our

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[81] *Republican National Committee* v. *Federal Election Committee*, 487 F. Supp. 280, 286 (S.D.N.Y.) (three-judge court), *aff'd summarily*, 100 S.Ct. 1639 (1980) (citing *Buckley*, 424 U.S. at 39-51).

own constitutional analysis of section 9012(f)'s prohibition of independent expenditures by political committees in excess of $1,000. This analysis turns on two fundamental questions which will explore whether section 9012(f) is consistent with the First Amendment after *Buckley*: (1) Does the proposed spending by the defendant political committees constitute an "expenditure" question under *Buckley*?, and (2) Are political committees, under *Buckley*, entitled to the same First Amendment rights to make independent expenditures as individuals and "informal groups?" We answer both questions affirmatively and hold that section 9012(f) is facially unconstitutional.

A. *Political Committee Prohibition Is an Expenditure Limitation and Thereby Limits Speech*

Under *Buckley* and the *Republican National Committee* cases the right of individuals and groups (outside of official campaigns) to make independent expenditures is a constitutional pillar of the election laws. Supporters of candidates have rights separate from the candidates they favor, rights which cannot be alienated by the candidate's choice with regard to public funding.[32] There is no constitutional reason that the organization of individual supporters of a candidate into groups called "political committees" should impugn the distinct and separate rights of campaign outsiders to sponsor political speech. Independent expenditures are the principal—and protected—source of this sponsorship.

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[32] *See Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. 280, 285-86 (S.D.N.Y.) (three-judge court), *aff'd summarily*, 100 S.Ct. 1639 (1980).

1. *This is Not a "Contribution" Case*

Buckley indicated clearly that expenditure limitations jeopardize First Amendment rights more severely than do limitations on contributions.[33] Consequently, *Buckley* held that the governmental interest in cleansing the electoral process of possible corruption was not enough to validate restrictions on expenditures. A "contribution" case, on the other hand, is entitled to less-exacting judicial scrutiny because "the transformation of contributions into political debate involves speech by someone other than the contributor."[34] The case before this court is an "expenditure" case because it is precisely the speech of individual contributors which is hampered by the statutory restriction.

The defendant political committees are simply "pooling agents" for many small voices wishing to make intelligible political statements. The money expended by the committees pays for political communications which speak the language of their members and contributors. It is the speech of the contributors which is defrayed by the contributions. Earlier, we noted that political speech is expensive nowadays. It requires a lot of money and a lot of sophistication to yield effective communication in the political arena. Political committees pool money from individuals who are interested in politics and amplify their shared viewpoint into an efficient political message. A simple example explains the efficiency argument: One thousand politically motivated persons could each afford to buy a short classified advertisement in one thousand local newspapers; if, however,

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[33] *See* Part II. D. *supra.*

[34] *Buckley* v. *Valeo*, 424 U.S. at 21.

they join together, pool funds and integrate planning, they can purchase perhaps an advertisement in a national magazine, or a commercial on network television. There can be little doubt that an economy of scale enhances the informational impact of larger units of communication. Since it is beyond contention that individuals and "informal groups" may make unlimited independent expenditures to express their First Amendment rights, political committees may not be denied the same right merely because they are *efficient* groupings of like-minded individuals.

2. *Individuals Speak Through Political Committees*

The communication sponsored by the political committees is the language of their members and contributors because the contributions are made based on an understanding and community of political interest among all of the contributors and their political committees. The contributors do have power over the speech disseminated by the political committees. Political speech like this is possible in the first instance only because the contributors contribute to one particular committee or another. Contributors associate in a particular political committee because that committee will express their own thoughts, which benefit thereby from amplitude in numbers and professionalism. If a committee disappoints its membership, contributions will dry up.

To require that contributors to political committees literally draft their own television and other public messages is naive. These contributors express themselves through political committees—their First Amendment rights are not merely coextensive with their actual participation in drafting specific lan-

guage. The language drafted by the steering groups of the political committees reflects the political speech common to all of the member-contributors. That the language and format employed in the groups' public political communications have a professional touch does not make it any less the language of the individual contributor; one of the things he or she most wants is the professional touch to make his or her speech efficient and effective in the modern age. One thousand individuals have just as much right to join together to do this as one man or woman to do it alone. It emasculates the guaranteed right of association to disallow political committees from organizing and focusing the views of their adherents.[35] Thus the expenditures undertaken by the political committees represent an efficient exercise of First Amendment rights of associated individuals. This exercise warrants the highest protection under *Buckley* and *Republican National Committee.*

3. *Speech Emanating from Political Committees Is Different from a Candidate's Speech*

A word is in order to point out how speech promulgated through a political committee bears a different relation to its constituent contributors than does a candidate's speech to his or her constituent supporters (or, contributors to the non-publicly funded candidate). A candidate strives to satisfy and mollify his or her supporters whenever possible; the politician, after all, depends considerably on pleasing supporters in order to maintain the campaign's momentum and coherence. Candidates are loosely tethered, not bound,

[35] *See* Part III. B. 2 *infra.*

to the notions of political speech held by their supporters. Political committees, on the other hand, are bound to reify the political thoughts of their member-contributors. The political communication by political committees is circumscribed by the expectations and understandings of the associates. The organizers of independent political committees, as agents and unlike candidates, are tied by their commitments to their particular contributors. The candidate, however, is free to exercise his or her own judgment as to what is in his or her own best interest based on a broader constituency. (This explains the apprehension with which many candidates' organizations look on the activities of uncoordinated and uncontrollable independent committees, but this does not and cannot limit the right of these independent committees to make their contribution to the robust political debate in any way they and their associates choose.)

The above comparison highlights once again the factual reality, as well as constitutional reality following *Buckley* and *Republican National Committee*, that the rights of candidates and their supporters are distinct. In *Buckley*, the Court realized that candidates could be ambivalent toward the independent political forays of their supporters. The Court noted that "[u]nlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." [36] Individuals, by associating in political committees, can express viewpoints that complement the positions of the favored candidate, or, they can express viewpoints which seek to influence or prod the candidate and the public. That individuals,

[36] *Buckley* v. *Valeo*, 424 U.S. at 47.

through their political committees, hope for a candidate's election in no way means that their own speech is interchangeable with the candidate's. The Constitution entitles even mainstream individuals favoring mainstream candidates to communicate their separate, if sympathetic, views.

4. *Political Committees Cannot Wield the* Quid Pro Quo: *The Compelling Interest in Eliminating Corruption is Insufficient to Justify Section 9012(f)*

As elaborated in Part II above, the *Buckley* Court sustained FECA's contribution, though not expenditure, limits on the basis of the compelling governmental interest in protecting elections from the taint of corruption. The Court saw in contributions to candidates the real possibility of corrupting *quid pro quos*. Independent expenditures, the Court felt, could not pose the same *quid pro quo* problem.

Similarly, the anticorruption interest cannot support the prohibition against *independent* expenditures by political committees. Any attempted exaction of a *quid pro quo* by a political committee would of course totally eliminate the constitutional protection reserved under *Buckley* for expenditures that are *independent*. A *coordinated*, non-independent expenditure by a committee might harbor a *quid pro quo*, but no more so than an individual's expenditures might.[37] Coordinated expenditures, by individuals or

[37] In fact, the large-scale operation of a political committee, requiring registration with the FEC, would be less capable of keeping a *quid pro quo* secret than could a wealthy individual operating without the bright sunshine of public scrutiny.

committees, are treated like contributions;[38] such contributions to a publicly funded candidate are of course illegal, but are inapposite to the constitutional issue here under consideration.

It is difficult, then, to imagine how the thousands of "small voices" associated together in a political committee could compromise a candidate for President. The political committees are venting the political ideas and commitments of their members, not of the candidate. The candidate will no more be beholden to the political committees than Presidents typically are to those elements of their constituency who voted for them. It is individuals themselves, acting in association, who are addressing political issues through independent expenditures. This public comment may persuade, and thereby influence decisionmakers, but it is protected by the First Amendment.[39]

A further check does now exist, however, on the power of political committees to finance the views of their members: contributions to committees are restricted in amount by 2 U.S.C. section 441a(a)(C). An individual may give only up to $5,000 to a political committee. This particular contribution limitation was not addressed directly in *Buckley*, but might be constitutionally permissible according to the *Buckley* rationale, which upheld other such limits.[40] What all

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[38] *See* notes 7-9, 29 & accompanying text *supra*.

[39] *See Let's Help Florida* v. *McCrary*, 621 F.2d 195 (5th Cir. 1980).

[40] Contribution limits to political committees have been upheld in two recent cases. *See California Medical Association* v. *FEC*, No. 79-4426, slip op. (9th Cir. 23 May 1980); *Mott* v. *FEC*, No. 79-3375 (D.D.C. 30 June 1980). Congress could, perhaps, if these authorities are upheld, shrink reasonable limits on contributions as it might deem necessary to control

of this clearly indicates is that while political committees may have the power to express sympathy and agreement with candidates, neither they nor individual members have the power to control the candidates they favor.

B. *Political Committees Have First Amendment Rights Commensurate With Individuals' Rights*

In the preceding section we demonstrated that the prohibition of section 9012(f) raises an *expenditure* question under *Buckley*, thereby implicating highly protected free speech rights. We also showed how political committees simply pool funds and channel the joint speech of their members. We now turn to consider directly the closely related question: whether political committees, as multi-person organizations, have First Amendment rights so inferior to those of individuals that they fall out from the protective aegis of *Buckley*?

1. Buckley *Comprehends First Amendment Rights for Groups*

It is absolutely plain that free speech rights protected under *Buckley* extend beyond individuals.

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further possibilities for corruption in the electoral process. We have no occasion here to express any view on the constitutionality of specific limitations on contributions to political committees. *But cf. California Medical Association* v. *FEC*, No. 79-4426, slip op. at 25-26 (9th Cir. 23 May 1980).

(Wallace, J., concurring and dissenting):

> Only in conjunction with outside donors will some unincorporated associations be able to aggregate sufficient funds and expertise to compete effectively in the political market place with other more affluent 'persons' capable of huge personal expenditures.

The Court there overturned "substantial and direct restrictions on the ability of candidates, citizens, *and associations* to engage in protected political expression. . . ."[41]

Furthermore, the Supreme Court has also emphasized that free expression may not be limited on the basis of the "identity of its source, whether corporation, *association*, union or individual."[42] As a "political committee" is defined in 26 U.S.C. section 9012 (9) as "any committee, association or organization" which receives contributions or makes expenditures for the purpose of influencing a candidate's election, it should fall under the same general protection reserved for groups and associations wishing to communicate their interests to the public. The fact of receipt of contribution (to finance expenditures) does not distinguish political committees from any other association which taken an active position on a candidate. Likewise, a political committee is no different under the First Amendment from a wealthy individual who may, it has been decided, lawfully dedicate his entire fortune to make independent expenditures paying for the same public communications, *e.g.*, television, magazine, newspaper, billboard advertisements, *etc.*, which the committee would undertake. Individuals—wealthy or otherwise—groups and associations, and political committees all engage in the same speech activities. In all cases the speech is

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[41] 424 U.S. at 58-59 (emphasis added). The Court also wrote: "It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, *groups*, and candidates." *Id.* at 39 (emphasis added).

[42] *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 777 (1978) (emphasis added).

meant to express active support for or opposition to a particular candidacy; *i.e.*, to express affiliation with and approval for the ideas of that candidate, or the reverse. This active support or opposition is buttressed by the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." [43]

2. *Freedom of Association Requires That Individuals Be Allowed to Join in Political Committees*

If section 9012(f) were not struck down, individuals of modest means would have no right to join with others to state their views to the public with some force. This right of association is crucial under the Constitution and recognized in *Buckley*. We believe what the *Buckley* Court said about FECA's contribution and expenditure limits is dispositive here on the right of individuals to join political committees and thereby amplify their ability to speak publicly on matters of political concern. The Court said:

> The Act's contribution and expenditure limitations also impinge on protected associational freedoms. Making a contribution, like joining a political party, serves to affiliate a person with

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[43] *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964).

We note that the election law exempts press organizations, 26 U.S.C. § 9012(f)(2)(A), and tax-exempt "section 501(c)" organizations, *id.* § 9012(f)(2)(B), from the limitations applicable to political committees. This discrimination against political committees along with the discrimination in favor of wealthy individuals is without constitutional foundation.

a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals. The Act's contribution ceilings thus limit one important means of associating with a candidate or committee, but *leave the contributor free to become a member of any political association and* to assist personally in the association's efforts on behalf of candidates. And the Act's contribution limitations permit associations and candidates to aggregate large sums of money to promote effective advocacy. By contrast, the Act's $1,000 limitation on independent expenditures "relative to a clearly identified candidate" precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association. See *NAACP* v. *Alabama*, 357 U.S. at 460. The Act's constraints on the ability of independent associations and candidate campaign organizations to expend resources on political expression "is simultaneously an interference with the freedom of [their] adherents," *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion). See *Cousins* v. *Wigoda*, 419 U.S., at 487-488; *NAACP* v. *Button*, 371 U.S. 415, 431 (1963).[44]

Politics is, after all, the unifying theme among members of political committees; their associational tie is the desire to affirm publicly their political viewpoint held in common. The organizers of political committees really only mobilize existing political sentiment

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[44] *Buckley* v. *Valeo*, 424 U.S. at 22-23 (emphasis added).

looking for an outlet—the small size of contributions freely given by diverse contributors expecting no personal glory or prospects of hobnobbing with celebrities attests to that. This phenomenon of the so-called political committees *is* the right of association to express political views together with others, and thereby impress the public. An independent association dedicated to effective political expression which was not in essence a "political committee" would be either an exempted organization,[48] or terribly quaint. The Constitution protects potent political voices along with the more effete ones; the First Amendment ensures both that persons may speak, and that they may speak together.

C. *Conclusion—Section 9012(f) Violates the First Amendment*

Given our holdings that section 9012(f) is an expenditure restriction, and is, therefore, a powerful inhibition on political speech, we must strike down that section as it fails to survive the strict scrutiny required by the First Amendment. The compelling governmental interest to fight electoral corruption is insufficient, here as in *Buckley*, to justify what amounts to a direct limitation on political speech. Whereas a presidential candidate by accepting public funds may choose for him or herself to do without unlimited contributions and expenditures, the candidate's public supporters have a separate, protected right to express themselves, individually or jointly. This preserves free access and full participation in the public debate.

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[48] *See* note 43 *supra*.

IV. COMMON CAUSE SUIT DISMISSED AS MOOT

In Count I of its lawsuit Common Cause sued for injunctive and declaratory relief to the effect that section 9012(f) applied to the defendant political committees and prohibited their proposed expenditures. This involves the same issue as in the action brought by the FEC, herein resolved against the FEC. Consequently, as in our 28 August 1980 Order, we dismiss Count I of Common Cause's action as mooted pursuant to our decision in the FEC action. We express no opinion whether Common Cause possessed the requisite Article III characteristics to press Count I of its lawsuit before this court.

V. COMMON CAUSE MAY NOT SUE *TO ENFORCE* THE ELECTION LAWS

Count II of the Common Cause complaint does not implicate section 9012(f)'s prohibitions against independent expenditures. Rather, the theory of Count II is "that the defendant committees are not in fact independent of Ronald Reagan and his authorized committees. The violations of the Fund Act that Count II alleges are violations that result from, and are premised upon, coordination and concerted action between defendant committees and the Reagan campaign." [46] We understand Count II to be an impermissible attempt by Common Cause, a private plaintiff, to enforce the Fund Act. We are without subject-matter jurisdiction under section 9011(b) to

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[46] Plaintiffs' Opening Brief on the Merits at 50.

hear this claim.[47] The FEC is charged by statute with exclusive enforcement jurisdiction of the election laws, and moreover, the alleged illegal coordination would violate Fund Act provisions only with respect to *candidates*, not the defendant political committees; therefore, we hold also that Count II fails to state a claim upon which relief can be granted.

A. *No Subject-Matter Jurisdiction to Hear a Coordination Claim*

Section 9011(b) of the Fund Act grants jurisdiction to three-judge district courts of the United States to entertain actions "to implement or construe" provisions of the Fund Act whether or not the plaintiff has exhausted administrative or other remedies.[48]

Count II, though, raises complicated questions of fact and difficult questions of election law policy which are without the scope of "implement or construe." It would be incongruous and cumbersome for a three-judge court, ordered by Congress to expedite its consideration,[49] to supervise extensive discovery and receive detailed factual evidence. This fact-finding, of course, is prerequisite to—and pertains to—a determination of *compliance* with the election laws.

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[47] Whether a single-judge district court would have jurisdiction under 28 U.S.C. § 1331 (1976) (federal question jurisdiction) is not before this court. Our holding dismissing Count II does not require explicit consideration of the Article III "case or controversy" requirement. As we find ourselves without subject-matter jurisdiction we leave open the question of Common Causes's standing to bring Count II of its complaint.

[48] 26 U.S.C. § 9011(b)(1) & (2) (1976).

[49] 26 U.S.C. § 9011(b)(2) (1976).

A compliance issue is not one properly before a three-judge court charged with implementation and construction of a congressional act; and, an expedited judgment on compliance is not appropriate to a non-expert three-judge court evaluating in the first instance circumstances surrounding an election controversy.

Congress ordered expedition in judicial review under section 9011(b) because elections come up fast and candidates, whoever they turn out to be, and others, need to know whether and how the election laws apply, and how much they provide.[50] So that elections run smoothly, Congress has provided only that three-judge courts (with direct appeal to the Supreme Court) shall: quickly construe doubtful (or, dubious) sections of the Fund Act, and/or quickly implement the Act's funding mechanism for the benefit of entitled candidates.

Three-judge district courts are convened typically in order to judge a statute's constitutionality on its face, or to clarify a statute's meaning and application pursuant to standard judicial statutory construction. Three-judge district courts were used in *Buckley* and *Republican National Committee* as a forum for constitutional challenges to the Fund Act.[51] In short, we view the section 9011(b) jurisdiction of

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[50] *See* S. CONF. REP. No. 92-533, 92d Cong., 1st Sess. 53-54 (1971); 117 CONG. REC. H. 12, 119 (9 Dec. 1971).

[51] *See also Jones* v. *Branigin*, 433 F.2d 576 (6th Cir. 1970), *cert. denied*, 401 U.S. 977 (1971) (substantial constitutional question prerequisite to convening of three-judge district court). All precedents are in accord supporting the proposition that three-judge district courts are extraordinary legal forums which are convened only to hear cases of special public interest.

this court narrowly. The narrow view is inherent in "implement or construe," by which we understand Congress to have limited the competence of this court to questions of fundamental statutory interpretation and to pressing pre-election questions of uncertainty regarding funds allocable to candidates.[52] Questions of Fund Act violations that require elaborate investigation of unique factual situations are not proper subjects for this court.

B. *FEC Has Exclusive Enforcement Jurisdiction*

Congress has legislated in no uncertain terms with respect to FEC dominion over the election law. Section 437c(b)(1) of FECA reads:

> The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act and Chapter 95 and Chapter 96 of Title 26 [*i.e.*, the Fund Act]. The Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions.[53]

Since we view Count II as clearly an enforcement action, an action to ensure compliance with various provisions of the Fund Act, we must hold that FECA's section 437c(b)(1) precludes any consideration of alleged coordination of expenditures as pressed by Common Cause before this court.

The FEC itself adjudges Count II of the Common Cause complaint as an action to enforce the election

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[52] The time-sensitivity of a candidate's—and others'—need to know about available funds explains § 9011(b)'s provision of jurisdiction notwithstanding any exhaustion of administrative remedies.

[53] 2 U.S.C. § 437c(b)(1), as amended by Pub. L. No. 96-187, § 306(b)(1), 93 Stat. 1355 (1979).

laws.[54] The FEC which was allowed to intervene in the Common Cause action moved to dismiss Common Cause's complaint for lack of subject-matter jurisdiction.

The FEC's position on its enforcement jurisdiction has recently been vindicated by a panel of the Court of Appeals for this circuit.[55] That court held that violations of the election laws[56] must first be brought before the FEC as within that agency's exclusive jurisdiction. The *Carter-Mondale* holding that the FEC has exclusive jurisdiction with respect to alleged campaign violations and noncompliance controls here.[57]

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[54] FEC Motion to Dismiss at 11 & n.8. The FEC contended in footnote 8 that its "suit clearly differs from Common Cause's suit as the Commission's suit does not seek enforcement of the Act," rather, it "seek[s] only [a] declaratory judgment of the construction and constitutionality of 26 U.S.C. § 9012(f) pursuant to 26 U.S.C. § 9011(b)." In text the FEC wrote that Common Cause was simply "bring[ing] an enforcement action in the guise of a suit to implement or construe the statute."

[55] *Carter-Mondale Reelection Committee, Inc.* v. *Federal Election Commission*, Nos. 80-1841 & 80-1842, slip op. (D.C. Cir. 12 Sept. 1980).

[56] The alleged violations in *Carter-Mondale* involved the same issues of coordination between political committees and the official Reagan campaign that are the substance of Common Cause's Count II. *See id.* at 8.

[57] "Exclusive jurisdiction," held the court, was especially powerful in the election law context. The law "provides for FEC enforcement through both informal consent proceedings and formal proceedings." *Id.* at 11. An FEC investigation may completely absolve the challenged conduct, or may result in a partial vindication resolved by a consent decree. The intrusion of massive discovery requests by a private

C. *Alleged Violations in Count II Do Not Apply to Political Committees*

Common Cause alleges in Count II that the defendant committees' proposed expenditures will violate sections 9003(b)(1), 9003(b)(2), 9012(a)(1), and 9012(b)(1) of the Fund Act. These provisions apply to presidential candidates who receive federal funding and must, therefore, limit their own expenditures and forgo private contributions.[58] Each of these sections can be violated only by *the candidate* receiving federal funds. Thus Count II does not state a claim alleging a violation of the Fund Act by the defendant political committees. This also confirms the impropriety of permitting a private party to enforce the election laws at its own discretion. For these reasons we dismiss Count II also for failure to state a claim upon which relief can be granted.

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party, like Common Cause, would plainly upset the delicate balance in the structure of campaign regulation. Common Cause would unsettle the coherent administration of election law policy and practice if allowed to go forward with Count II of its complaint.

[58] Candidates may not restrict the individual rights of their supporters as a result of the choice to accept public funding. *See* notes 30-32 & accompanying text *supra*.

CONCLUSION

Consistent with our Orders of 28 August 1980, we deny the FEC's motion for summary judgment and grant summary judgment for the defendant political committees and individuals on the grounds that section 9012(f) violates the Constitution. We dismiss Count I of the complaint brought by Common Cause as moot; Count II is dismissed for lack of subject-matter jurisdiction and for failure to state a claim.

So ordered.

/s/ Edward A. Tamm
EDWARD A. TAMM
Circuit Judge

/s/ Malcolm Richard Wilkey
MALCOLM RICHARD WILKEY
Circuit Judge

/s/ John Garrett Penn
JOHN GARRETT PENN
District Judge

Sep. 30, 1980

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. 80-1754

Three-Judge Court

FEDERAL ELECTION COMMISSION, PLAINTIFF

v.

AMERICANS FOR CHANGE, ET AL., DEFENDANTS

ORDER

The Court, having before it the pleadings, motions, affidavits, and briefs of the parties and amici curiae, heard oral argument on August 19, 1980. Because of the nature of the case the Court is of the view that the decision, like the briefing and argument, should be expedited, with opinion or opinions to follow.

It is therefore ORDERED

1. That the motion of the American Civil Liberties Union Fund of the National Capital Area for leave to participate as Amicus Curiae is GRANTED.
2. That the motion of Common Cause to intervene is DENIED.

3. That the motion of the Plaintiff Federal Election Commission for Summary Judgment is DENIED.
4. That the motions of the Defendants Americans for Change, Americans for an Effective Presidency, and Fund for a Conservative Majority for Summary Judgment are GRANTED.
5. That all other pending motions by all parties are DENIED.

/s/ Edward A. Tamm
EDWARD A. TAMM
Circuit Judge

/s/ Malcolm Richard Wilkey
MALCOLM RICHARD WILKEY
Circuit Judge

/s/ John Garrett Penn
JOHN GARRETT PENN
District Judge

Aug. 28, 1980

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CA 80-1609

Three-Judge Court

COMMON CAUSE, ET AL., PLAINTIFFS

v.

HARRISON SCHMITT, ET AL., DEFENDANTS

FEDERAL ELECTION COMMISSION, INTERVENOR

FEDERAL ELECTION COMMISSION, PLAINTIFF

v.

AMERICANS FOR CHANGE, ET AL., DEFENDANTS

ORDER

The Court hereby orders that the above cases be consolidated.

/s/ Edward A. Tamm
EDWARD A. TAMM
Circuit Judge

/s/ Malcolm Richard Wilkey
MALCOLM RICHARD WILKEY
Circuit Judge

/s/ John Garrett Penn
JOHN GARRETT PENN
District Judge

Sep. 24, 1980

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1754

(Three-Judge Court)

FEDERAL ELECTION COMMISSION, PLAINTIFF

v.

AMERICANS FOR CHANGE, ET AL., DEFENDANTS

Civil Action No. 80-1609

(Consolidated)

(Three-Judge Court)

COMMON CAUSE, ET AL., PLAINTIFFS

v.

HARRISON SCHMITT, ET AL., DEFENDANTS
FEDERAL ELECTION COMMISSION, INTERVENOR

NOTICE OF APPEAL

Notice is hereby given that plaintiff Federal Election Commission appeals to the Supreme Court of the United States, pursuant to 26 U.S.C. § 9011(b)

and 28 U.S.C. § 2101(b), from the final order entered in this action on August 28, 1980.

Respectfully submitted,

/s/ Charles N. Steele
CHARLES N. STEELE
General Counsel

/s/ Kathleen Imig Perkins
KATHLEEN IMIG PERKINS
Assistant General Counsel

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OCTOBER 8, 1980

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 80-1754

(Three-Judge Court)

FEDERAL ELECTION COMMISSION, PLAINTIFF

v.

AMERICANS FOR CHANGE, ET AL., DEFENDANTS

Civil Action No. 80-1609

(Consolidated)

(Three-Judge Court)

COMMON CAUSE, ET AL., PLAINTIFFS

v.

HARRISON SCHMITT, ET AL., DEFENDANTS

FEDERAL ELECTION COMMISSION, INTERVENOR

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Notice of Appeal upon each of the parties to this action and upon the Solicitor General of the

United States by first-class mail to the following persons:

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Washington, D.C. 20530

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Counsel for Plaintiffs

OCTOBER 8, 1980

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-441

FEDERAL ELECTION COMMISSION, APPELLANT

v.

AMERICANS FOR CHANGE, ET AL.

FEDERAL ELECTION COMMISSION, APPELLANT

v.

HARRISON SCHMITT, ET AL.

ORDER

UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including December 28, 1980.

/s/ Warren E. Burger
Chief Justice of the
United States

Dated this 19th day of November, 1980

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PENN, J.

Civil Action No. 80-1754

FEDERAL ELECTION COMMISSION, PLAINTIFF
1325 K Street, N.W.
Washington, D.C. 20463

v.

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COMPLAINT

JURISDICTION AND VENUE

1. Jurisdiction of this court is invoked under 28 U.S.C. § 1345 as an action commenced by an agency of the United States expressly authorized to sue by an act of Congress. This action is instituted pursuant to the Presidential Election Campaign Fund Act ("Fund Act"), which provides that the Federal Election Commission may institute in the United States district courts such actions, including those for declaratory relief, as may be appropriate to implement or construe provisions of the Fund Act. 26 U.S.C. §§ 9011(b)(1) and (2), 9010(c).

2. Convening of a three-judge district court to hear and make a determination in this action for declaratory judgment brought to implement and construe a provision of the Fund Act is required by 26 U.S.C. §§ 9011(b)(2) and 9010(c). Those statutory provisions also require that this action be heard and determined on an expedited basis.

3. Venue is properly found in the district of the District of Columbia.

PARTIES

4. Plaintiff Federal Election Commission (hereinafter "the Commission") is the independent agency of the United States vested with the authority to litigate questions involving the construction, implementation and validity of the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013, as well as the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-435, and the Presidential Primary Matching Payment Account Act, 26 U.S.C.

§§ 9031-9042. The Commission is also vested with primary and exclusive jurisdiction with respect to civil enforcement of these laws. *See* 2 U.S.C. §§ 437c (b)(1), 437d(a)(6), 437d(e); 26 U.S.C. §§ 9005 (a), 9007(a) and (b), 9010(c), 9011(b), 9036(a), 9038(a) and (b), 9040(b), (c) and (d).

5. Defendant Americans for Change ("AFC") is an unincorporated association and a political committee within the definitions of 2 U.S.C. § 431(4) and 26 U.S.C. § 9002(9). AFC registered with the Commission on May 23, 1980, designating as its records custodian Stan Huckaby, assistant treasurer, whose mailing address is 310 First Street, S.E., Washington, D.C. AFC listed as its sole campaign depository the American Security Bank of Washington, D.C.

6. Defendant Americans for an Effective Presidency ("AEP") is an unincorporated association which is a political committee as defined by 2 U.S.C. § 431(4) and 26 U.S.C. § 9002(9). AEP registered with the Commission on July 9, 1980, designating as its treasurer Robert H. Masson, and listing as its address, 1225 19th Street, N.W., Washington, D.C.

7. Defendant Fund for a Conservative Majority ("FCM") is a political committee, as defined by 2 U.S.C. § 431(4) and 26 U.S.C. § 9002(9). FCM originally registered as a political committee in 1972 as the "Young Americans' Campaign Committee". On October 13, 1976, FCM filed an amendment changing its name to Fund for a Conservative Majority. The chairman of FCM is designated as Robert C. Heckman.

STATEMENT OF CLAIM

8. Pursuant to 26 U.S.C. §§ 9003(a) and (b), 9004(a)(1) and 9006, the presidential nominees of

the Democratic and Republican parties will be eligible to receive public federal funding of their campaigns in the 1980 general election. *See* 26 U.S.C. § 9002(2), (4) and (6), 9003(b), and 9004(a)(1). Upon information and belief, the candidates nominated by both the Democratic and Republican parties will elect to request public financing of their general election campaigns pursuant to the provisions of section 9005 of the Fund Act. 26 U.S.C. § 9006.

9. Section 9012(f) of the Fund Act, entitled "Unauthorized expenditures and contributions," provides with respect to committee expenditures to support publicly financed candidates that:

> it shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000.

26 U.S.C. § 9012(f)(1).

10. Defendants AFC, AEP, and FCM, by registering with the Commission pursuant to 2 U.S.C. §§ 431(4)(A) and 433, and by their public announcements and statements, have indicated that each is a political committee which will knowingly and willfully expend in excess of $1000 prior to November, 1980, in support of the election of the candidate for President nominated by one of the major political parties. *See* 26 U.S.C. 9002(6).

11. Such expenditures, to be made by these political committees to further the election of a major party presidential candidate funded pursuant to 26 U.S.C. § 9006(b), will be expenditures "which would constitute qualified campaign expenses if incurred by an authorized committee of such candidate[s], in an aggregate amount exceeding $1,000." 26 U.S.C. § 9012(b). *See* 26 U.S.C. § 9002(1), (4) and (11).

12. The Commission, seeking to fulfill its statutory authority to litigate questions involving the construction, implementation and validity of the Fund Act and to prevent violations of the Fund Act, *see* 2 U.S.C. §§ 437c(b)(1) and 437d(a)(9), institutes this action pursuant to 26 U.S.C. §§ 9011(b) and 9010(c) in order to obtain a declaration implementing and construing section 9012(f) of the Fund Act as prohibiting the conduct defendants will undertake, as described in paragraph 10 and 11, above. *See also* 2 U.S.C. § 437d(a)(6).

WHEREFORE, Plaintiff Federal Election Commission prays that this court:

(1) promptly convene a three-judge district court pursuant to 26 U.S.C. §§ 9011(b)(2) and 9010(c);

(2) declare that the expenditures defendants intend to undertake in the 1980 general election in support of the publicly funded campaign of the Presidential nominee of one of the major political parties, are prohibited by and would be in violation of 26 U.S.C. § 9012(f)(1);

(3) declare that 26 U.S.C. § 9012(f)(1) as applied to the defendants is constitutional;

(4) order such other and further relief as the court deems appropriate.

Respectfully submitted,

/s/ Charles N. Steele
CHARLES N. STEELE
General Counsel

/s/ Lawrence M. Noble
LAWRENCE M. NOBLE
Assistant General Counsel

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